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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

RALPH M. SHAW,
F. H. MOORE,
A. F. SMITH,
F. H. TOWNER,
Counsel for Petitioners.

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No. 234

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Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, and MISSOURI PACIFIC RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Chicago Great Western Railroad Company and The Kansas City Southern Railway Company submit this petition for a writ of certiorari to review a decision of the

United States Court of Appeals for the District of Columbia, and file herewith a certified copy of the entire transcript of the record in said cause and their brief in support of this petition.

Summary Statement of the Matter Involved.

This action originated in the Supreme Court of the District of Columbia with the filing by petitioners of a petition for a writ of mandamus directed to the Interstate Commerce Commission to compel it to take jurisdiction of issues theretofore submitted to it in intervening petitions filed with it by petitioners. The Commission had dismissed petitioners' intervening petitions on the ground, so petitioners claim, that it had no jurisdiction to afford the relief requested or determine the rights of petitioners asserted in those intervening petitions.

The facts out of which the litigation arises are set out in the report of the Commission (R. 94 *et seq.*) and in the decision of the Court of Appeals (R. 245) and may be briefly stated. The Kansas City Terminal Railway Company (hereinafter called the "Terminal Company") is a Missouri corporation organized in 1906 for the purpose of acquiring, constructing and operating a new union station and terminal facilities in Kansas City, Missouri-Kansas, for the benefit of ten trunk line railroads entering the old union station in Kansas City. On June 12, 1909, an operating agreement (R. 17 *et seq.*) was entered into for a term of 200 years, under which agreement each of the ten companies agreed to use the facilities of the Terminal Company and to pay its share of the expenses of said Terminal Company, including taxes and interest and principal on its bonds, when due, as well as the expenses of operating and maintaining the Terminal Company's facilities (R. 25, 26, 31).

It was further agreed that if any using company defaulted in making its payments, the other companies would pay their proportion of the amount in default (R. 26), and the method of apportioning among the using or proprietary companies the amounts to be paid by them was also fixed (R. 25 *et seq.*, 31 *et seq.*). The agreement further provided that the payment of its portion of the Terminal Company's expenses was a condition precedent to the right of any using or proprietary company to use the Terminal Company's facilities (R. 43 *et seq.*). On the same date (June 12, 1909) the same parties executed a stock trust agreement for the same term of 200 years (R. 136 *et seq.*) in which agreement they agreed to carry out the terms and provisions of the operating agreement and pledged their stock as security for such promise.

On January 12, 1910, petitioners herein, Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, became parties to the stock trust agreement and the operating agreement through the execution of a supplemental operating agreement (R. 63 *et seq.*) and a supplemental stock trust agreement (R. 162 *et seq.*). At the time of the proceedings before the Commission each of the twelve proprietary companies owned $183,333.33 of stock in the Terminal Company, and there was no other stock outstanding. This condition still obtains.

In conformity with said agreements the Terminal Company issued and sold $50,000,000 of bonds secured by its properties then owned and to be thereafter acquired (R. 240), and then proceeded with the acquisition of the properties necessary for its purposes and the construction and reconstruction of the necessary facilities, which now comprise the new union station and large terminals used for both freight and passenger service. The new station was put in operation in November, 1914.

The operating and supplemental operating agreements require each proprietary company to pay one-twelfth of the taxes of the Terminal Company and one-twelfth of the interest and principal payments due upon its bonds. Under the same agreements, the operating and maintenance expenses of the Terminal Company are paid by the using or proprietary companies on a user basis. All of these amounts, however, are paid to the Terminal Company as compensation for the use of its terminal facilities by each of the owning lines, since that is the only return the owning lines receive for their money. There is some distribution by the Terminal Company among the owning lines of amounts paid as rental by tenants of the union station, but these amounts are inconsequential, as the terminal was constructed to furnish transportation facilities and not as a profit-making venture.

Some of the using or proprietary companies have always made much more use of the Terminal Company's facilities than do other companies. There are four so-called large users and eight so-called smaller users. Under the operating agreement, petitioners, which make very small use of the Terminal Company's facilities (2.61 per cent by the Chicago Great Western and 2.24 per cent by the Kansas City Southern in 1932), each pay one-twelfth of the Terminal Company's interest and taxes, and their share, on a user basis, of the operating expenses of the Terminal Company; while the Atchison, Topeka and Santa Fe Railway Company, for example, made 26.06 per cent of the total use of said facilities in 1932, but still paid only one-twelfth of the taxes and interest charges of the Terminal Company. Exhibit 2 attached to the petition filed in the trial court (R. 84) shows the percentage of use by each using line in 1932, the amounts paid by each on account of interest and taxes of the Terminal Company under the operating agree-

ment and what each line would have paid for interest and taxes on a user basis.

As a result of this distribution of these charges, the cost to petitioners for their use of the Terminal Company's facilities for the year 1932, for example, included $190,836.96 paid by the Chicago Great Western and $190,816.99 paid by the Kansas City Southern on account of interest and taxes, while the amount paid by the Santa Fe on the same account was $195,303.56. Had these charges for interest and taxes been divided on a user basis, the Santa Fe would have paid $599,655.32, the Chicago Great Western $60,057.57, and the Kansas City Southern $51,543.67.

Some time prior to March 10, 1924, the property of the Missouri, Kansas and Texas Railway Company, one of the proprietary companies of the Terminal Company, was sold at foreclosure sale to the Missouri-Kansas-Texas Railroad Company, and this latter company refused to adopt the operating agreement. Its refusal to so adopt the agreement was later upheld by the courts. On March 10, 1924, the Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order pursuant to the provisions of paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company. The principal ground of the application was that the terms of the operating agreement were unjust, inequitable and burdensome, in that the companies using the Terminal Company's facilities were required to pay the Terminal Company's interest charges and taxes on a numerical basis.

All of the proprietary companies of the Terminal Company were permitted to file intervening petitions in the proceeding thus instituted. In those petitions, the Terminal

Company and the larger users alleged that the Missouri-Kansas-Texas Railroad Company should not be permitted to use the Terminal Company's facilities except in conformity with the terms of the operating agreement, and the smaller users, including petitioners, alleged that if the Missouri-Kansas-Texas Company were permitted to use the Terminal Company's facilities on terms more favorable than their own, similar relief should be granted them; also that in any event, the terms of the operating agreement were inequitable, unjust, unreasonable, discriminatory and unlawful. They prayed that all the companies using the Terminal Company's facilities should be permitted and required to pay for such use upon a fair, just and equitable basis. The intervening petitions filed by petitioners were attached to the petition filed in the trial court as Exhibit 3 (R. 85 *et seq.*) and Exhibit 4 (R. 87 *et seq.*).

After hearing, the Commission issued a report on November 10, 1925 (R. 94 *et seq.*; 104 I. C. C., R. 203), finding that the Missouri-Kansas-Texas Railroad Company should be permitted to use the facilities of the Terminal Company, but dismissing the intervening petitions of petitioners and the other small users on the ground (as petitioners claim) that it had no jurisdiction under the law to alter the obligations imposed by the operating agreement upon the users of the Terminal Company's facilities. Three members of the Commission dissented from the majority opinion in so far as it refused relief to the smaller users, and expressed the opinion that the tax and interest charges of the Terminal Company should be apportioned upon a user basis, or upon some basis more just and equitable than the numerical basis imposed by the operating agreement (R. 231 *et seq.*).

Nothing further was done in the proceeding before the Commission until March, 1931, when the Missouri-Kansas-

Texas Railroad Company filed an application for further hearing to determine the amount of compensation which it should pay for its use of the Terminal Company's facilities. In April and May, 1931, and before any hearing was had upon the last mentioned application, petitioners filed their petitions in said proceeding praying for a rehearing upon the order dismissing their intervening petitions. Said petitions for rehearing were denied on June 1, 1931.

Thereafter from time to time hearings were had on the application of the Missouri-Kansas-Texas Railroad Company, but the proceeding was still pending when petitioners, on May 31, 1933, filed their petition (R. 2 *et seq.*) in the Supreme Court of the District of Columbia, praying for a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions, and its order of June 1, 1931, denying their petitions for rehearing; and to compel the Commission to hear and decide the issues raised by said intervening petitions upon their merits. On June 7, 1933, the Commission filed its answers (R. 201 *et seq.*).

The Terminal Company, the Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company were permitted to intervene (R. 210, 229, 240) as respondents and thereafter filed answers (R. 210 *et seq.*, 229 *et seq.*). Under these answers and a stipulation made upon the hearing in the trial court (R. 240, 241), the essential allegations of fact contained in the petition filed in that court were admitted. Those facts are as set out herein, in the report of the Commission and in the decision of the Court of Appeals.

The cause came on for hearing in the Supreme Court of the District of Columbia on June 22, 1933, on a demurrer

filed that day by petitioners to the answers theretofore filed by respondents. The trial court overruled the demurrer and petitioners electing to stand thereon, an order was entered on June 23, 1933, dismissing petitioners' petition for a writ of mandamus, but allowing an appeal to the United States Court of Appeals for the District of Columbia. The trial court wrote no opinion in the case. The case was thereafter submitted in the Court of Appeals and decided on May 7, 1934. The Court of Appeals affirmed the decision of the trial court, holding that the Commission had actually taken jurisdiction of the proceedings before it; that in the exercise of such jurisdiction it had held it had no authority under the law to do what petitioners desired it to do, and that this action on its part was impregnable to mandamus. Mr. Justice Hitz, while concurring in the judgment of the court, dissented from the view of the other members of the court that the Commission might not have power, in the exercise of jurisdiction, to grant the relief prayed for by petitioners (R. 256).

We should advise this Court that while this case was pending in the lower courts, the Commission promulgated reports dealing with the compensation to be paid by the Missouri-Kansas-Texas Railroad Company for its use of the facilities of the Terminal Company; that in the lower courts some respondents urged that because of the Commission's reports, the case had become moot, and also that the writ should not issue because of the claimed laches of petitioners. The major questions presented, however, are:

First. Was the Court of Appeals correct in deciding that the Commission exercised jurisdiction when it dismissed the petitions filed with it by petitioners?

Second. If the Commission did not so exercise jurisdiction, does it have power under paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce, upon a proper

record, to order a discontinuance of a discrimination and prejudice found by it to exist, even though such discrimination and prejudice results, as in this case, from the operation of an existing contract?

Third. If the Commission did not so exercise jurisdiction, does it have power under paragraph (4) of Section 3 of the Act to Regulate Commerce to prescribe the terms upon which railroads may use terminal facilities of another railroad, where, as in this case, there is an existing contract permitting such use upon terms specified in such contract?

Reasons Relied Upon for the Allowance of the Writ.

The general reasons relied upon for the allowance of the writ herein are:

(1) In deciding that the Commission had exercised jurisdiction in dismissing petitioners' intervening petitions in the case before it, the Court of Appeals misconstrued and did not give proper effect to applicable decisions of this Court.

(2) In deciding that the Commission had exercised jurisdiction in the case before it, the Court of Appeals conferred an immunity upon the Commission's action not warranted by law and in conflict with previous decisions of this Court.

(3) If, as respondents claim, the Commission did not exercise jurisdiction in dismissing petitioners' intervening petitions in the case before it, the question of whether or not it has the jurisdiction and power claimed by petitioners has not been directly passed upon by this or any other Court, but should be determined. The variety of opinion that now exists with respect to that question is indicated by the differing views thereon expressed by the Justices of the Court of Appeals.

(4) The question of the Commission's jurisdiction and power as presented by petitioners is of great interest to the railroads, and the public interest requires that it be determined as promptly as possible.

WHEREFORE, petitioners pray that this petition for a writ of certiorari may be granted, and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing, the judgment of the Supreme Court of the District of Columbia and of the Court of Appeals of said District be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 234

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BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

This case comes to this Court on a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia. The cause originated in the Su-

preme Court of the District of Columbia with the filing by petitioners of a petition praying for a writ of mandamus requiring the Interstate Commerce Commission (hereinafter called the "Commission") to exercise a jurisdiction claimed to have been conferred upon it by law, but which it had refused to exercise. The Supreme Court of the District of Columbia dismissed the petition and this action was affirmed by the United States Court of Appeals for the District of Columbia.

The report of the Commission upon which the action is based was made on November 10, 1925, and is officially reported at 104 I. C. C. 203. It appears at pages 94 *et seq.* of the printed record. The Supreme Court of the District of Columbia handed down no opinion in dismissing the petition filed with it. The opinion of the Court of Appeals is not yet officially reported but was handed down on May 7, 1934, and appears in the printed record at pages 245 *et seq.* The facts upon which the Commission's report was based are sufficiently set forth in the petition for certiorari filed in this Court and we will not repeat them here.

The petition in the Supreme Court of the District of Columbia was filed on May 31, 1933. After setting out the facts, it alleges that in its report and order of November 10, 1925, the Commission declined to exercise a jurisdiction conferred upon it by law and prays for the issuance of a writ of mandamus to compel the exercise of such jurisdiction. Respondents answered and these answers (R. 201, 210, 229), together with a stipulation made upon the hearing (R. 240, 241) in the Supreme Court of the District admit the essential allegations of fact contained in the petition.

The case came on for hearing in the Supreme Court of the District on June 22, 1933, on a demurrer filed by petitioners to the answers theretofore filed by respondents

(R. 238, 239). The court overruled the demurrer and petitioners electing to stand thereon, an order was entered dismissing the petition but allowing an appeal to the Court of Appeals (R. 239). On May 7, 1934, the Court of Appeals handed down its decision affirming the action of the Supreme Court of the District (R. 245).

ARGUMENT.

I.

The Court of Appeals erred in holding that the Commission had exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners.

In the Court of Appeals, petitioners necessarily claimed that the Commission had not exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners, but, that on the contrary, such dismissal constituted a denial of jurisdiction. The Court of Appeals overruled this contention, basing its decision upon its conclusion that the Commission had exercised jurisdiction and that this being so, mandamus was not the appropriate remedy. We submit that what the Commission did and said demonstrates the incorrectness of the conclusion reached by the Court of Appeals.

It is, of course, true that the Commission had held hearings and made a large record before it promulgated its report of November 10, 1925, but the record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad, and not to determine the issues raised by petitioners. The power of the Commission to determine the issues raised by petitioners had been questioned in a motion to dismiss their intervening petitions. Referring to that issue, the Commission said (R. 113):

> "Controverting respondents' challenge of our power or authority to grant any such relief, the interveners

> contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement."

Speaking of the argument in support of the motion to dismiss, the Commission said (R. 114):

> "The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto."

Summarizing the issue presented to it by the intervening petitions and the motion to dismiss, the Commission then said (R. 114):

> "Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of its claimed power under paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said (R. 115):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

Discussing its power under Section 15a of the same Act, the Commission said (R. 116):

> "However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

After a discussion of paragraphs (1) and (3) of Section 3 of the same Act, the Commission said with respect to them (R. 116):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Then follows its conclusion, it being said (R. 117):

> "An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee and Alton."

Thus, it definitely appears that the issue raised by the motion to dismiss was stated as being one of power and jurisdiction; that the question which the Commission decided was said to be one of its jurisdiction and power; and that the conclusion stated by it was reached only after a consideration of its jurisdiction and power. In fact, referring to the power claimed for it by petitioners, the Commission said (R. 116):

> "we are unable to find the requested power or authority in any other provision of the act."

Moreover, in reaching its conclusion with respect to the claims of petitioners, the Commission did not consider the facts. On the contrary, it discarded the facts as a basis for its decision, saying with respect to different methods of distributing the charges of the Terminal Company (Rec. 108):

> "No particular purpose would be served by considering them in turn, as the conclusions reached make it

> unnecessary to determine which, if any, embodies an accurate or acceptable formula for division of the charges in question upon a user basis."

We submit that these circumstances definitely show a denial of power and jurisdiction by the Commission. The Court of Appeals held that the Commission did hear and decide, but also said (R. 254):

> "But we think the appellants' position in this respect is grounded upon a mistaken theory. It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask."

It seems to us this statement is inconsistent. A lack of power to order the discontinuance of discrimination asserted by petitioners would seem to be equivalent to a lack of power to hear evidence and decide that the discrimination existed. Otherwise, there might be a determined case of discrimination and prejudice violative of the law, with no power in the Commission to order its removal, presumably because of the existence of the operating agreement with the Terminal Company. Even the Commission, however, held that there was no such virtue in the agreement (Rec. 114).

Again, the Court of Appeals said:

> "If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion."

It seems to us that this is equivalent to saying that the Commission, upon considering the law, concluded that it did not have the power and jurisdiction claimed for it. Such a conclusion when followed by a refusal to act, as in this case, is, we submit, reviewable on mandamus. The

Court of Appeals apparently concluded that the taking of jurisdiction by the Commission for the purpose of deciding that it did not have the claimed jurisdiction made its action impregnable to mandamus. This conclusion overlooks the fact that in every case where there is a denial of jurisdiction, there must necessarily be some hearing by a court or commission to determine the question, and that such action does not constitute a taking of jurisdiction. Thus, in *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, this Court, in referring to the Commission, said at page 484:

> "It may exercise judgment and discretion, and it may be cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

So in this case, it seems clear that the Commission denied its power from what petitioners claim was a misunderstanding of the law; and apparently the Court of Appeals also thought it had denied the power claimed for it.

Nor does the case of *Wilbur* v. *United States*, 281 U. S. 206, 218-219, support the conclusion of the Court of Appeals. In that case the writ was denied because granting it would have operated as a reversal of a decision made by the Secretary of the Interior in the exercise of a discretion conferred upon him by statute. The test to apply here is that laid down in *Interstate Commerce Commission* v. *United States et al.*, 289 U. S. 385, where this Court in denying mandamus said at page 394:

> "If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way."

If a writ of mandamus were to issue in this case, it would require the Commission only to adjudicate the merits of the cause presented by petitioners' petitions. It would not require the determination of that cause in any particular way. The Commission would still be free to determine it in any way it (the Commission) thought proper. We submit that in this respect this case is governed by *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission*, 246 U. S. 638, and *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Company*, 224 U. S. 474.

In the *Louisville Cement Company* case, *supra*, the Commission concededly took jurisdiction of the Cement Company's claim for reparation and held that the rates assailed were unreasonable to the extent claimed, but further held that since the claim was not filed within two years after some of the shipments were delivered, it had no jurisdiction or power to award reparation with respect to those shipments. Even in the view of the Court of Appeals, that is precisely what happened in the case at bar, for that court in its opinion, referring to the Commission's action, said:

> "It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask."

In the *Humboldt Steamship Company* case, *supra*, substantially the same situation was presented. There the petition by the Steamship Company was to require certain other transportation companies to file tariffs with the Commission. The Commission held hearings as in the case at bar, and decided that it was without jurisdiction to make the order sought by complainant because in construing the Act to Regulate Commerce, it concluded that Alaska was not a territory of the United States. This is

precisely what the Commission did in the case at bar, since it held, upon a consideration of the law, that it was "unable to find the requisite power and authority" to make the order sought by petitioners.

We submit that the Court of Appeals erred in holding that the Commission exercised jurisdiction in making its report of November 10, 1925, in so far as that report dealt with the claims of petitioners.

II.

The Commission had power and authority to consider the claims of petitioners and upon a proper showing to grant the relief requested.

Paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce (U. S. C. A. Title 49, pp. 158, 195) read as follows:

> "(1) *Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

> "(3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares,

and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Concededly the purpose of these sections of the Act was to destroy favoritism, prohibit preferences and eliminate every form of discrimination and inequality. *N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Central Railroad Company of New Jersey* v. *United States,* 257 U. S. 247; *Tap Line Cases,* 234 U. S. 1; *C. I. & L. Ry. Co.* v. *United States,* 270 U. S. 287.

The prohibition of the law against discriminatory and prejudicial practices operates in favor of carriers as well as shippers. *Pennsylvania Company* v. *United States,* 236 U. S. 351, 361; *Louisville & Nashville R. Co.* v. *United States,* 238 U. S. 1, 20; *Baltimore & Ohio Railroad Company* v. *United States,* 264 U. S. 258, 267; *Chicago, Indianapolis & Louisville Railway Company* v. *United States,* 270 U. S. 287; *Tap Line Cases,* 234 U. S. 1, 29. Thus, in the *Tap Line* cases, *supra,* this Court said at page 29 that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantage to particular carriers and shippers." It would seem to follow that if petitioners were able to show that the operating agreement at Kansas City creates a discrimination and prejudice against them because of the expenses imposed upon them as related to the amount of service received, the Commission would have the right and power to require that such discrimination and prejudice be discontinued.

Since the passage of the Transportation Act, 1920, the power of the Commission has been greatly enlarged. That Act introduced a new railroad policy into Federal legisla-

tion, the object of which was to insure adequate transportation service, and the Commission was required to take such steps as might be necessary to insure such service. *Railroad Commission* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *A. C. & Y. R. Co.* v. *United States*, 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Commission* v. *Southern Pacific R. Co.*, 264 U. S. 331; *Colorado* v. *United States*, 271 U. S. 153.

Under this rule, excessive expenditures from the common fund in local interest may prejudice interstate commerce. *Colorado* v. *United States*, 271 U. S. 153, 163; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 343. The Commission has exclusive jurisdiction over physical connections between railroads, even though the law does not confer the power in terms. *Alabama & Vicksburg Co.* v. *Jackson & Eastern R. Co.*, 271 U. S. 244, 248. The Commission has exclusive jurisdiction over excessive payments under trackage agreements, and may prohibit them. *Transit Commission* v. *United States*, 289 U. S. 121.

If in this case the operating agreement at Kansas City was shown to be such a burden upon petitioners as to prejudice their interstate commerce, there can scarcely be a doubt of the Commission's right and power to remedy the situation. Its possession of that power has been indicated. *Cincinnati, etc., Ry. Co.* v. *Indianapolis, etc., Ry. Co.*, 36 F. (2d) 323, 325. See also separate opinion of Mr. Justice Hitz in the Court of Appeals (R. 256). It may not be doubted that if the Kansas City terminal facilities were to be built now, the approval of the Commission would be required, both as to construction and financing. It would be odd if there was a complete lack of power in the case at bar merely because the facilities are now in existence and being used.

The existence of the operating agreement would not be a bar to the exercise of such power. Even the Commission

held that the existence of the agreement was no bar to the exercise of jurisdiction by it (R. 114). Certainly that is the law. *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Calhoun* v. *Massie*, 253 U. S. 170; *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.*, 234 U. S. 294; *State of New York* v. *United States*, 247 U. S. 591; *Stephenson* v. *Binford*, 287 U. S. 251; *Colorado* v. *United States*, 271 U. S. 153; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 282; *Nebbia* v. *New York*, 291 U. S. 502. Nor are petitioners now estopped in any way by their participation in the operating agreement. *Los Angeles Switching* case, 234 U. S. 294, 312.

Nor would the fact that the operating agreement is pledged under the stock trust agreement and that the Terminal Company has bonds outstanding limit the Commission's power. The bondholders receive their interest and principal payments from the Terminal Company and are not concerned with the contributions by the owning railroads to the Terminal Company. They are only concerned with getting their money, and in this they would be protected by the operating agreement even if all charges of the Terminal Company were distributed on the user basis and petitioners were the only carriers using the terminal facilities.

The Commission apparently thought that petitioners desired it to rewrite the operating agreement (R. 115, 116) and the Court of Appeals seemed to have the same view when it said that it doubted if the law justified the annulment of a valid contract for the use of terminal facilities (R. 254). Petitioners do not desire such a rewriting of the Kansas City operating agreement. Our argument is that the law undoubtedly confers power upon the Commission to prevent or cure prejudice and discrimination and that this power cannot be limited by the agreement. The exact

contention of petitioners was well stated by Commissioner Eastman in his dissenting opinion (R. 129).

It is worthy of note that both the Commission and the Court of Appeals were impressed with the injustice imposed upon petitioners by the Kansas City operating agreement. The Commission suggested the advisability of a reexamination by the participating carriers of all such terminal arrangements, saying that the subject was of such importance to the public, including the railroads, that a reappraisal should be voluntarily undertaken. After quoting this language the Court of Appeals said (R. 253):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result."

The Court of Appeals then pointed out that in 1932 the operation of the agreement cost petitioners approximately $150,000 in excess charges, and further said:

> "No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt."

In view of these conclusions it is indeed difficult to understand how it may be decided that an agreement which "seriously impairs" petitioners' ability to operate their properties on a satisfactory basis is immune from the regulatory authority of the Commission.

What we have said refers to the asserted violations of paragraphs (1) and (3) of Section 3 of the Act to Regulate Commerce. In addition, we contend that the Commission had power to grant the requested relief under Paragraph (4) of Section 3 of the Act (U. S. C. A. Title 49, p. 201). This paragraph was added to the Act by the Transportation Act, 1920, and, in so far as it is pertinent, reads as follows:

> "If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

It may not be doubted that the Commission denied its power and jurisdiction under this paragraph, for with respect thereto it said (R. 115):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

We submit that this was error. The conclusion was apparently reached because petitioners were already entitled to the use of the facilities of the Terminal Company, provided they made the payments and sustained the other obligations imposed by the operating agreement. The reasoning overlooks the fact that the granting by the Commission of a right to use and the fixing of reasonable compensation for such use are of equal importance. The granting of a

right to use would be worthless if a carrier owning terminals had the right to charge such a high rental for the use of such facilities as to prohibit the use. Conversely, the fixing of reasonable compensation would be useless unless the right to use was also granted. Thus, in the case at bar the value of the right to use the facilities of the Terminal Company, granted to petitioners by the operating agreement, is greatly impaired because of the excessive compensation which they are required to pay for such use.

In *C. & A. R. Co.* v. *T., P. & W. R. Co.*, 146 I. C. C. 171, the complaining railroad had been offered the right to use the terminal facilities there involved upon the payment of a compensation which it thought was excessive. The Commission, however, held that it had jurisdiction to grant the right to use and to fix the compensation therefor, even though the only real issue was the amount of compensation. This was also true in the case of *Transit Commission* v. *United States*, 289 U. S. 121. There is now and for years has been disagreement between the Kansas City railroads, including petitioners', as to the compensation to be paid by the proprietary lines for their use of the Terminal Company's facilities. The Commission has construed the law so narrowly as to substantially limit its application and the power of the Commission thereunder; results distinctly not in harmony with the purposes sought to be accomplished by the enactment of the legislation.

III.

Since it had power to do so, it was the duty of the Commission to investigate and determine the merits of the issues presented by petitioners.

Petitioners and respondents are all common carriers subject to the Interstate Commerce Act. Paragraphs (1) and (3) of Section 3 of that Act (U. S. C. A., Title 49, pp. 158, 195) are specific in declaring unlawful the preference, ad-

vantage and discrimination referred to therein and in prohibiting the same. Paragraph (4) of Section 3 (U. S. C. A., Title 49, p. 201) definitely confers upon the Commission power to fix the terms and conditions under which one carrier may use the terminal facilities of other carriers. Paragraph (1) of Section 12 (U. S. C. A., Title 49, p. 368) authorizes and requires the Commission to execute and enforce the provisions of the Act.

Paragraph (1) of Section 13 (U. S. C. A., Title 49, p. 377) authorizes any common carrier to file with the Commission a petition complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention thereof, and further provides that if such complaint is not satisfied, the duty of the Commission is to investigate the matters complained of in such manner as it shall deem proper. Paragraph (1) of Section 14 (U. S. C. A., Title 49, p. 394) makes it the duty of the Commission after investigation to make a report in writing stating its conclusions and its decision in the premises.

Thus, the Commission having jurisdiction, it is plain that the statute is mandatory with respect to the action to be taken by it upon petitioners' intervening petitions filed with it. It had no choice except to receive such petitions, hold appropriate hearings with respect to the issues raised thereby, and after a consideration of the merits, announce its conclusions thereon.

IV.

The case is not moot.

We refer to this matter because it was a defense advanced by some respondents in the lower courts, although not mentioned in the decision of the Court of Appeals. We submit that it may not be held to be an effective defense, although

the Commission has made reports with respect to the issues raised before it by the petitions of the Missouri-Kansas-Texas Railroad. Those reports of the Commission are not final in the sense that a court judgment becomes final. They do not constitute a judgment. The proceeding is always subject to rehearing on petition or on the Commission's own motion and the reports may always be set aside or altered.

Moreover, the rights asserted by petitioners in their petitions to the Commission were peculiar to them, and they are entitled to an adjudication of those rights without respect to what may have been done on the petition of the Missouri-Kansas-Texas. So far as petitioners are concerned, the case is not moot until the question of the Commission's jurisdiction has been determined.

It has been held many times that where an intervening petition in an action at law or equity is dismissed upon the ground that it does not state a cause of action, the intervener may review such judgment on a writ of error. *United States* v. *Northwestern Development Co.*, 203 Fed. 960; *In Re Michigan Central R. R. Co.*, 124 Fed. 727; *Illinois Steel Company* v. *Ramsey*, 176 Fed. 853; *Automobile, etc., Corporation* v. *United States*, 39 F. (2d) 288. The foregoing cases are cited only to show that an intervener has a right to pursue his rights in any case to which he is a party. In *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14, this Court sustained the right of the Commission, an intervener in the lower court, to a decision on the merits, although the United States had declined to appeal.

Since this case involves a question of public interest and the Commission has failed to perform its duty on the assumption that it has no jurisdiction, the rights of petitioners should not be foreclosed on the ground that the case has been disposed of on other issues. 4 *C. J.* 576,

Notes 81-82-83, Sec. 2383; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

V.

Petitioners have not been guilty of laches.

We refer to this point also because it was a defense advanced by some respondents in the lower courts although the Court of Appeals did not refer to it. The answers to the arguments made are numerous. Although the Code of the District of Columbia (Sec. 213, Title 24, part 2, Mandamus) requires all defenses of a defendant to be set up in its answer, no respondent herein set up the defense of laches in the answer filed by it. Laches is essentially a defense and while in some jurisdictions it may not be necessary to set it up in the answer (*Moore* v. *Nickey*, 133 Fed. 289, 293; *Sullivan* v. *Portland*, 94 U. S. 806, 811), it is necessary under the Code of the District of Columbia. Not having been so set up, it should not be available to respondents now as a defense.

Furthermore, the only laches with which petitioners could be charged was the delay from June 1, 1931, when their petitions for rehearing were denied by the Commission (R. 10), to May 31, 1933, when the petition in this case was filed (R. 2). During this period there was no change whatever in the conditions under which the property of the Kansas City Terminal Railway Company was used by petitioners and the railroad respondents (R. 5, 6, 11, 240, 241). The same basis of payment prevails now as in 1925 (R. 241). It follows that no respondent was prejudiced by petitioners' failure to start this suit at an earlier date, and this being so the doctrine of laches has no application.

Mere passage of time does not constitute laches. *Bunch* v. *United States*, 252 Fed. 673, 677, 678; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, 288, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688, 689; *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 448-490. No statute of limitations applies to the action which petitioners seek to compel, and this being true, laches has no function. *Bunch* v. *United States, supra; Williamson* v. *Monroe*, 101 Fed. 322; *Broatch* v. *Boysen*, 175 Fed. 702, 707; *Brun* v. *Mann*, 151 Fed. 145, 154.

Petitioners now have and in the past have had a continuing right to a decision by the Commission and under these circumstances the doctrine of laches does not apply. *Amy* v. *City of Galena*, 7 Fed. 163, 166; *United States* v. *Board of Auditors, etc.*, 28 Fed. 407, 409; *Bedgisoff* v. *Cushman*, 12 F. (2d) 667, 668. Since the lapse of time has not prejudiced any party to the litigation other than the small users, the claim of laches should not be sustained. *Chapman* v. *Douglas*, 107 U. S. 348; *Chiswell* v. *Johnston*, 299 Fed. 681, 689; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, 288; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688-689.

Laches is an equitable principle which is applied to promote but never to defeat justice. *Bunch* v. *United States*, 252 Fed. 673, 677, 678; *Williamson* v. *Monroe*, 101 Fed. 322, 330; *Spiller* v. *St. L. & S. F. R. Co.*, 14 F. (2d) 284, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May*, 2 F. (2d) 688, 698; *Brun* v. *Mann*, 151 Fed. 145. If applied here, it will preclude the determination of the Commission's jurisdiction and will deny to petitioners that justice to which they are entitled.

All cases sustaining the defense of laches are distinguishable. In *Arant* v. *Lane*, 249 U. S. 267, *In the Matter of Eastern Cherokees*, 220 U. S. 83, in *Ex Parte American Steel Barrel Company*, 230 U. S. 35, and in *United States*

v. *Blair*, 293 Fed. 847, the defense of laches prevailed only because a contrary rule would have required double payments or would have created what was described in the *Blair* case, *supra*, as "endless and needless confusion" and a defeat of the purposes of the laws involved.

Any delay in starting this action prejudiced only petitioners and those other railroads whose percentage of use of the facilities of the Terminal Company is less than the percentage of payments required to be made by them. Neither the Commission nor any other respondent was damaged thereby. Since laches in an action at law does not constitute a defense; since this action is not subject to any statute of limitations; and since petitioners have done nothing to mislead, deceive or damage any other party; we submit that laches may not control the disposition to be made of the cause. *Thorpe et al.* v. *William Filene's Sons Co.*, 40 F. (2d) 269.

Conclusion.

We submit that upon the conceded facts it ought to be held that the Commission did deny its jurisdiction; that it actually possessed the power and authority which it denied; that the case is not moot and that the defense of laches may not prevail. We submit, therefore, that the petition for certiorari filed herein should be granted in order that the question involved, which is one of large public interest, may be finally determined by this Court.

Respectfully submitted,

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